

Service Date: June 20, 1990

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of Burlington Northern Railroad )	
Company to discontinue its agency )	DOCKET NO. T-9162
and dispose of the depot facility )	
at Chester, Montana. )	ORDER NO. 5982

\* \* \* \* \*

PROPOSED ORDER

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APPEARANCES

FOR THE APPLICANT:

Charles C. Dearden, Murphy, Robinson, Heckathorn & Phillips, P.C., One Main Building,  
P.O. Box 759, Kalispell, MT 59903

FOR THE INTERVENOR:

Donald R. Marble, P.O. Box 649, Chester, Montana 59522, appearing on behalf of Liberty  
County

FOR THE COMMISSION:

Garth Jacobson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner and Hearing Examiner

The Hearing Examiner, having taken evidence and being fully advised in the premises, issues the following Proposed Findings of Fact, Conclusions of Law, and Order pursuant to Section 2-4-621, MCA.

### BACKGROUND

Burlington Northern Railroad Company (BN) applied to the Montana Public Service Commission (Commission) on December 18, 1987 for authority to discontinue its agency operations and dispose of the depot facility in Chester, Montana (Chester).

On June 14, 1988 BN withdrew its request to dispose of the depot facilities, and limited its petition to termination of the agency functions at Chester.

The Commission noticed BN's application and held a public hearing on October 19, 1988 in the District Courtroom, Liberty County Courthouse, 101 1st Street East, Chester, Montana.

During the hearing, the attorney for Liberty County moved to dismiss the petition on the grounds that BN could not keep the agency facilities at Chester without keeping the agent pursuant to § 69-14-202, MCA.

Following the hearing, parties agreed to brief the issues of whether farmers are shippers (although not directly contracting for shipper services) and whether safety is properly an element of public convenience and necessity. Testimony raised the foregoing issues.

SUMMARY OF TESTIMONYTestimony of Applicant

Testifying for BN were Brian Aman, Ed Hencz, William Allbright and James Whittmyer.

Brian Aman, BN's assistant manager of data quality in Seattle, Washington, oversees agency and yard office functions, implements and monitors new programs and does station audits.

Mr. Aman testified on the role of a central agency, or Central Billing Center (CBC), in handling shipping in the present organization of BN. Mr. Aman testified that the CBC located in Great Falls does all the functions that are done by an agent. The central agency is staffed 24 hours a day, and run on computer while the local agent's hours are eight hours per day, five days per week. At Chester, most customers go through the CBC. When they do call the agent, he calls the CBC. The CBC prepares waybills for movement of the cars, traces cars for customers and keeps demurrage (penalty for delay in loading) records. The CBC receives its information from the yard offices and train crews.

The shipping procedure is initiated by the customer calling the CBC and placing a car order, i.e., stating what car type is needed, when and where (s)he wants the car (spotted), what commodity will be shipped, and if possible, the destination of the loaded car. The information is logged in the car order book on file and electronically transmitted to the car distribution office (for this area, Seattle, Washington) which pens a destination and forwards the cars through a train or series of trains through a tagging system to the destination. When the train arrives at the destination, the cars to be spotted have a SPRINS number and destination (assigned to a customer) which indicates to the crew where to spot the car(s). The car distribution office in Seattle controls distribution, which is all done on computers. After the train crew spots the car(s), it notes the time and date on the wheel report which is forwarded to the CBC at the conclusion of its tour of duty for notification and calculation of possible demurrage. The customer after loading the car may telephone, send by facsimile, or mail the bill of lading to the CBC for the agent's signature, to be returned to the shipper. BN also provides that the shipper may have power of attorney for the railroad and sign the bill of lading as agent for BN, and keep a copy. The waybill produced from information on the bill of lading is entered into a computer. Any CBC can trace cars with the waybill information in the computer system. If a shipper has a problem, he will call the CBC. The CBC will either handle the problem directly or refer the problem to appropriate personnel, including the trainmaster. Mr. Aman also testified that when a customer receives a shipment by rail it is similarly processed through the CBC.

Mr. Aman testified that the agent, Mr. Eugene Bergtson, is 61 years old and a protected employee. If the agency is closed, he has various options under his union agreement not to jeopardize his retirement or be out of a job.

Mr. Aman testified that BN contacted the shippers in the community prior to the application and none objected to closure.

Mr. Aman further testified that BN would not dispose of the depot facility, but would retain it for the maintenance of way people.

Mr. Aman testified that BN will contact potential new shippers and explain how the centralized agency works, including the paper work procedures and toll-free number. The contact

is generally personal, from a marketing personnel from BN. However, on one-time shipments or a temporary basis, it may be handled by telephone.

Edward L. Hencz, BN's trainmaster/road foreman from Cut Bank to Havre, is responsible for the operation of the trains, the crews and clerical staff in that area. He testified that train service would not be affected by the closure of the agency at Chester. He testified that in response to a request from a shipper, the agent at CBC calls a dispatcher and tells him that there is a car on a train to be spotted at Chester. The conductor on the train would receive a message to spot a car at the industry. At the next stop after spotting a car, the conductor will leave a note stating where and when the car was spotted. If the car is misspotted, CBC, once notified, will call the dispatcher who will determine what train can stop and respot it and direct it to do so. Mr. Hencz testified that he had not received significant complaints regarding misspotted cars in the previous year, perhaps three calls a month. The local agent could get no quicker response than the CBC in correcting a misspotted car. As trainmaster, he is available 24 hours a day.

Mr. Hencz and other personnel of BN actively engage in setting up new shippers. The agent has no involvement in developing new customers or setting up accounts. Under cross-examination, Mr. Hencz testified that there are approximately 30 shippers between Cut Bank and Havre.

Mr. Hencz testified that local agents have not performed agency functions since 1985. The local agents are no longer required to do roll-by inspections. Roll-by inspections are done by maintenance and track crews, as well as by the train crews themselves. In addition, heat detectors are located at Lothair and Inverness in the area which can detect dragging equipment as well as heat. At Blackfoot and Burnham there are also high-wide detectors which detect shifted load or something protruding.

Mr. William T. Allbright, BN's senior cost analyst, compiles revenue, expense and carload data. He prepared, sponsored and testified on Exhibit A, a compilation from business records of the company. In 1984, 27 cars were forwarded and 47 received at Chester, for a total of 74 cars. In 1985, 32 cars were received and nothing forwarded. In 1986, 25 cars were forwarded and 30 received. Ninety cars were forwarded and 32 received in 1987, while in the first half of 1988, 70 cars were forwarded and 24 received. The blind siding at Tiber had totals of 667 cars in 1984, 296 in 1985, 378 in 1986, 603 in 1987 and 511 in the first half of 1988. The blind siding at Buelow had two cars received in 1987. At a blind siding, traffic is forwarded or received but no agent is physically present. Cars are spotted, loaded and unloaded without an agent.

Mr. Allbright testified that on behalf of BN he did unit time studies in cooperation with BN's operating department to determine the amount of time which would be spent on agency functions at Chester in one year. He concluded that 80 hours out of 2,000 annual hours would be spent on agency duties, while 250 hours would be spent on other station work such as janitorial. This would amount to approximately 17 percent of the agent's time required for agency duties and 83 percent of his time available for other work. The agency duties have been done by the CBC since 1985. Mr. Allbright did not do a specific time and motion study of the Chester agency, but based the analysis upon a hypothetical set of facts.

Mr. Allbright testified that BN had net revenue of \$326,449 in 1984, \$127,972 in 1985, \$118,945 in 1986, \$218,540 in 1987 and \$188,860 in the first half of 1988 attributed to the Chester agency. Under the Belt/Carter formula (required by the Commission as a result of hearings

at Belt and Carter, Montana), the agency at Chester is profitable. Under the Burlington formula to determine profitability, the Chester agency showed net losses for the same period of time. Under cross-examination he admitted that the blind siding was profitable.

Mr. Allbright testified that BN operates in 25 states and 2 Canadian provinces with 190 agencies as of the date of hearing. Thirty-seven of these agencies were in Montana, seven in Colorado, two in South Dakota, six in North Dakota, six in Wyoming and sixteen in Nebraska. Under cross-examination, he testified that two functioning agencies [the CBC5 in Montana actually do agency work. The comparison was for illustrative purposes.

James D. Whittmyer, BN's division agent and supervisor of the CBC in Great Falls, testified that the CBC has several clerks working around the clock taking car orders, keeping track of demurrage, doing the waybilling and other accounting, fielding problem calls and doing other agency functions for the division. The CBC was established in 1983 for billing first, and finalized in 1984 for waybilling, bill of lading and other paperwork functions. Customers can call the CBC, as well, for such problems as car spotting. The CBC will contact the dispatcher who will check the train schedule and have the next available train stop to correct the spotting error. If the problem involves a bad order car, the dispatcher will send out a repair truck or available local forces to repair the car.

Mr. Whittmyer testified that BN keeps contact with the customers in semi-annual meetings. BN has received no complaints from shippers in areas where local agency service has been terminated. A customer desiring to make a shipment contacts the CBC which puts it in touch with BN marketing personnel to work up a contract rate or regular tariff rate. If the situation is unique, someone from CBC, or possibly the trainmaster, goes to the location.

Mr. Whittmyer testified that the toll-free number may be obtained from contact with BN personnel, through the phone company. BN has sent postcards to all the agencies, shippers and customers on the division.

The Applicant rested its case.

#### Testimony of Liberty County, Intervenor's Witnesses

Eugene Bergtson, BN's local agent at Chester, appeared and testified under subpoena upon the request of the attorney for Liberty County. At the time of hearing, Mr. Bergtson was 61 years old and had worked for the railroad since 1947. He had been a station agent for 28 years at Joplin when he moved to Chester in 1984. He testified that as an agent he still does roll-by inspections, looking for hot boxes, dragging equipment, hanging doors and anything out of the ordinary. His hours of work are 7:00 a.m. to noon and 1:00 p.m. to 4:00 p.m. He testified that there are hot box detectors at Lothair and Inverness in the district and two others. These can also detect dragging equipment. As a local agent, he can do more than check for hot boxes. He does yard checks five days a week, checking car numbers, whether loaded or empty, what condition the cars are in, etc. He checks the location of spotted cars. He does not service the blind sidings now. If he sees a misspotted car he calls the CBC. However, with waybilling removed to CBC now, he cannot determine if a car is misspotted. BN removed his radio communication, so he cannot tell where a train is until he sees or hears it. To contact a train he would have to call the dispatcher, who is at times hard to reach.

Mr. Bergtson testified that he maintains a hazardous materials tariff in case of emergency. People have reported fires on the railroad right of way, and he tries to get the dispatcher. If the dispatcher decides the section crew is too busy or far away, the dispatcher will have the agent call the Chester fire truck. He has a message phone to dial certain areas. Radio contact would only work for a short radius. Under cross-examination, Mr. Bergtson admitted that the time table provided for all BN operating people contained information relating to hazardous material.

Mr. Bergtson testified that he seldom receives calls from local shippers. Shippers load at Tiber and Chester and do their business with Great Falls. If shippers contact him, he gives them the toll-free number of the CBC. If a customer notifies him that a car is misspotted he calls the CBC which then takes care of it. If a customer does not know where the cars are, the agent gives him the toll-free tracing number. Letting the customer handle it cuts out one step.

Mr. Ray Standiford, County Commissioner of Liberty County, opposed the termination of the agency. He expressed concerns about the possibility of reopening the factory without assistance from BN for special shipping needs in bringing in raw steel. He also was concerned about the hazardous materials BN hauls through the area. The county is developing a disaster and emergency plan, and he would prefer to have a local agent who could contact the crews in an emergency.

#### Testimony of Public Witnesses

Florence Thieltges, Chester, Montana, testified about her concern that if the agency were removed Chester would not have an opportunity to get a passenger train stop.

Trudy Laas Skari, farmer from Chester, Montana, testified on the economic detriment to Chester of the loss of the agent's position and salary. Mrs. Skari testified that she considered farmers to be shippers since the price and dockage for grain has a direct effect upon her as a farmer. She does not directly contract with the railroad for shipping, but rather with the elevator. Mrs. Skari had a preference for dealing with the local agent.

Joe Gottfried, farmer/rancher from Shelby, Montana and a Toole County Commissioner, testified on the economic detriment to small communities when the railroad takes employees from a community. He has shipped through the elevator and also independently contracted with the railroad several years before. He expressed concern that the removal of the agency would make it more difficult for the farmer to ship independently without the assistance of the elevator. He testified that the agent's presence was generally beneficial. Mr. Gottfried testified that the farmer pays freight on all commodities, coming and going. The price the farmer receives for grain is less the freight cost to the west coast.

Troy Lackey, Chester, Montana, a retired businessman, farmer, rancher and former public servant, testified that the presence of an active agency enhances the economic image of a small community and facilitates economic development. Dealing with a local agency on a person-to-person basis is the most efficient way of getting things done. He testified that he was involved in negotiations on a project to revive the cultivator shovel manufacturing plant west of Chester. The plant would depend upon the shipment of steel and facilities for moving the products. Mr. Lackey testified that BN had assisted the community in promoting the reactification of the plant and shown an interest in providing service.

Dennis Iverson, Whitlash, Montana, former legislator and a farmer, testified that he supported the legislation allowing closure of an agency if the railroad could meet the burden of proving that it was not needed for the public convenience and necessity. He testified that it was his perception with a room full of the public that the agency service was necessary. He opposed the closure of the Chester agency. As a farmer, he testified that he is a potential shipper although he had not personally made shipping arrangements since the mid-70's. He feared if he were to ship again that the process would not work as well without the local agent.

Karen Mattson, Chester, Montana, vice president of Mattson Brothers, Inc., raises spring wheat and barley and sells through the elevators. She testified that the proper timing and spotting of grain cars financially affects the producers and shippers, despite the reluctance of shippers to testify. Ms. Mattson speculated that with the hub placed in Shelby, the heavy use of the northern line and the Canadian Free Trade Act, that an agent should be present to monitor repairs and traffic. An agent could also assist in setting up traffic for the shovel factory if it comes on line. She concluded that it is important to keep the agent for future business development.

Mike Novak, Chester, Montana, a retail grocer, testified as to safety concerns. His business is located 100 yards from the tracks. If there is an accident involving hazardous materials, he is concerned that there will not be as quick a response to cleaning up or containing the hazard without an agent in the community. As a former volunteer fireman, he also believed that an agent in the community would be more able to respond.

Tom Gummer, Chester, Montana, president of Gummer Farms, testified in favor of keeping the agent. Ten years before with railroad caused fires, he had lost grasslands. Without an agent, he believed it would be difficult to collect damages. He was further afraid that the section crew would go after the agent, thereby increasing safety concerns.

Darby O'Brien, Chester, Montana, testified in opposition to closing the agency. With trains carrying hazardous substances and operating without cabooses, he felt that an agent should be present to check each passing train.

James T. Mular, Butte, Montana, appearing on behalf of the Transportation and Communication Union which has a contract with BN in agency services, testified in opposition to the closure of the agency. His first criticism centered on BN's present practices on bills of lading, which he apparently contended were not properly negotiated contract instruments to move freight legally without the local agent's presence. He also testified in effect that BN desired to close the agency for its own convenience and not for the public convenience and necessity.

#### DISCUSSION, FINDINGS AND ANALYSIS

Under § 69-14-202(2), MCA, the Commission shall authorize the closure, consolidation or centralization of a facility if a railroad demonstrates to the Commission that the facility is not required for public convenience and necessity. At the time of this application, when the facility at issue was for the purposes of shipping, the Commission's test for determining public convenience and necessity involved a threshold determination of whether the railroad had a duty to maintain and furnish shipping facilities under § 69-14-202(1), MCA.

##### **69-14-202. Duty to furnish shipping and passenger facilities. (1)**

Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and

staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

The Commission weighed the needs of the shipping public for rail service against the railroad's burden of maintaining agency service.

The 1989 Legislature modified § 69-14-202(2), MCA, by adding the following language:

In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

Since the legislature does not engage in idle acts, the Commission reads this amendment to § 69-14-202, MCA, to reflect the desire of the legislature for the Commission to expand its analysis to include impacts of the proposed closure upon persons other than shippers. A review of the legislative history of this amendment supports such an interpretation.

The Commission determines that there are two tests to apply in determining whether an agency may be closed under § 69-14-202(2), MCA:

1. the narrower test (pre-1989 legislature) which requires a railroad to demonstrate that an agency is not required for the convenience and necessity of the shipping public; and



2. the broader test (per 1989 amendment) which requires the Commission to consider, in addition to testimony on shipping, any other facts and testimony related to burdens to the general public if the application were granted to close the agency.

Public convenience and necessity is not an absolute standard that can be determined by a formula. It must be determined by the facts and circumstances of each case. Under the first test, the Commission must weigh the needs of the shippers served by the railroad for rail service against the railroad company's burden of maintaining agency service. The second test requires the additional consideration of the needs and concerns of the general public in the communities served by the railroad.

The Commission does not need to determine in this proceeding which test to apply. Application of either test results in a determination that public convenience and necessity does not require the agency at Chester to remain open.

According to Mr. Aman, before the hearing the railroad contacted its known shipping customers in Chester and there were no objections to closure of this agency. One farmer testified that farmers are shippers, even when they do not directly contract with the railroad. No shippers who recently engaged the services of BN appeared and testified. The Commission determines that there is not compelling shipper testimony such that the agency should remain open. The Commission has historically relied upon shipper needs to determine whether public convenience and necessity justifies local agency service. The preference of a farmer who does not personally utilize the shipping service does not rise to the level of public convenience and necessity.

The issue of whether a farmer is a shipper was briefed. The Commission determines that for the purpose of determining public convenience and necessity of the shipping public, farmers who do not personally use shipping facilities are not shippers. Unlike McCarty Farms v. BNRR Co., 91 F.R.D. 486 (D. Mt. 1981), the issue is not one of damages for the "injury" of being overcharged on rates thus passed through to farmers in the shipping process. If farmers personally made shipping arrangements and/or established through their testimony that they would be substantially inconvenienced in shipping by the loss of the local agent, then opponents could claim a necessity to keep the agent. There was no such showing here. Agency services previously provided by the local agent appear to be adequately provided by BN in its CBC. Based upon BN's testimony that the Great Falls CBC is willing and able to provide all necessary services (and has been providing all agency services), the Commission finds that the public convenience and necessity of the shipping public does not require the Chester agency to remain open.

The Commission is sympathetic with the concerns of the community regarding its economic future. There was no evidence presented, however, that BN would not meet the shipping needs of future industry without the local agent.

The Commission also finds that there was no evidence sufficient to persuade it that this agency was necessary to meet safety concerns of the public regarding fire prevention, fire reporting, and maintenance of hazardous material information. These are not functions which can only be satisfied by the presence of a local agent. The Commission determines, however, that the railroad is responsible to expedite fire reporting and enable the local fire departments to fight the fires with reasonable knowledge of the train schedules. To this end, the Commission directs BN to file documentation by April 1, 1990 with the Commission demonstrating that the fire department in

Chester and Liberty County is fully informed of proper procedures to expedite fire reporting and obtaining train schedules.

### CONCLUSIONS OF LAW

The Public Service Commission has jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 14, MCA.

The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter as required by Title 2, Chapter 4, MCA.

No specific rule can be used to determine whether public convenience and necessity requires a given service to be performed. The facts in each case must be separately considered. See Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Board of Railroad Commissioners, 225 P.2d 346 (Mont. 1953), cert. den. 346 U.S. 823. The Commission concludes that the public convenience and necessity does not require the continuance of an agency at Chester, Montana.

The Commission concludes that Burlington Northern Railroad Company may utilize the Chester depot as a maintenance or way station.

### ORDER

NOW THEREFORE IT IS ORDERED that Burlington Northern Railroad Company's application in Docket No. T-9162 to close the agency at Chester, Montana is Granted, subject to the conditions provided herein.

IT IS FURTHER ORDERED that Burlington Northern Railroad Company shall apply § 69-14-1001, MCA, as required.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this docket that were not ruled on are denied.

IT IS FURTHER ORDERED that BN shall file documentation with the Commission as directed herein by April 1, 1990 demonstrating that the fire department in Chester and Liberty County are fully informed on procedures regarding reporting of fires and obtaining train schedules.

IT IS FURTHER ORDERED, pursuant to Section 2-4-621, MCA, that this is a proposed order only. Any party has the opportunity to file exceptions to this initial decision, present briefs, and make oral arguments before the full Commission. Exceptions and supporting briefs must be filed with the Commission within twenty (20) days from the date of service of this proposed order.

DONE AND DATED this 20th day of February, 1990.

BY ORDER OF THE PUBLIC SERVICE COMMISSION

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DANNY OBERG, Commissioner and  
Hearing Examiner

ATTEST:

Ann Peck  
Commission Secretary

(SEAL)